

100 GOVERNANCE OF FAIRS

100 OVERVIEW

Each director is a voting member of the board charged with the authority and responsibility to develop policies, procedures and regulations for the operation of the fair; to monitor the fair's financial health, programs and overall performance; and, to provide the chief executive officer (CEO) with the resources to meet the needs of the fair.

101 BOARD'S ROLE IN THE GOVERNANCE OF FAIRS

The Fair Board (Board) works together with the Chief Executive Officer (CEO) focusing on policy objectives; the operational, financial and the administrative functions of the fair; strategic planning strategies, the budget, and the long term welfare of the fair. The Board sets broad policies and goals, giving the CEO the support and full authority to implement them in the day-to-day management of the fair. It is important that the CEO and Board develop and implement fiscal and operational policy and procedures which instill the "best business practices" principles. Individual members of the Board have no authority to act independently of the full board. Appendix A of this chapter identifies the general division of responsibilities between the Board of Directors and the CEO.

RESPONSIBILITIES OF THE FULL FAIR BOARD INCLUDE:

- Establish policy
- Hire the CEO
- Prepare an annual performance evaluation for the CEO
- Provide guidance on the fair's long-term goals and expectations
- Develop the fair's strategic plan (updated every three years. The next update is due November 2002)
- Ensure the fair implements "best business" practices (refer below for additional information)
- Adopt a balanced Operating Budget
- Monitor finances to ensure the fair remains a viable going concern
- Support the fair's full Board of Directors and establish annual goals and objectives
- Adopt key operating policies and procedures
- Develop, support and encourage positive community and business relations

INDIVIDUAL BOARD MEMBER RESPONSIBILITIES INCLUDE:

- Actively support all fair activities, including interim activities and fair sponsored events
- Attend all Board meetings well-prepared and well-informed
- Actively participate in fair meetings and conferences sponsored by its business partners (i.e., Fairs and Expositions, Western Fairs Association, California Fair Alliance)

- Consider other points of view, make constructive suggestions and help the Board make decisions that benefit the fair and the community it serves
- Serve and rotate on committees
- Represent the fair to individuals, the public, and, other fairs and associations
- Assume Board leadership roles when requested

101.1 Board's Work Plan

One of the Board's self-management tools is a written work plan, which should be formulated annually for the board as a whole, as well as for each standing committee. Plans need not be complicated, and, should list the Board's and each committee's objectives and priorities for the coming year.

101.2 Board and Committee Meeting Attendance

Full participation, including regular attendance at Board and committee meetings, is an obligation of board membership. Directors should expect to serve as members and leaders of Board committees and task forces, as well as to attend as many Board meetings as possible throughout the year. Regular attendance is one of the criteria the Governor's Office considers in re-appointing members to District Agricultural Association (DAA) Boards. State law provides that any DAA director who misses three consecutive regular meetings of the board, without permission of the Board, is deemed to have resigned as a director.

101.3 New Board Member Orientation

Every fair should conduct orientation programs for new Board members. Orientation should include a thorough review of the Board's basic responsibilities, and an overview of current issues, major policy and strategy questions on record and those on the horizon, focusing on the fair. Specific examples, drawn from the fair's recent history, should be cited to illustrate the scope and process of board oversight. The CEO should prepare this material in consultation with the Board.

101.4 Board Member Resignation (DAAs Only)

The Appointments Secretary in the Governor's Office considers a DAA director to have resigned upon the Governor's receipt of written notice from either the director or the Fair Board President (acting upon direction of the Board). The resigning director may serve until replaced. A director whose term has expired also may serve until replaced or re-appointed by the Governor.

102 CEO's ROLE IN THE GOVERNANCE OF FAIRS

CEO's assist the Board in formulating the fair's policies and annual plan of business strategies. Following established strategies, the CEO should prepare an annual concise progress reports which recommends ways the Board may develop its annual work of the Board and its committees in relationship to the fair's strategic priorities. By identifying

issues, framing the questions and presenting the information needed for decision making, the CEO shapes the discussion that precedes actions taken by the Board.

102.1 Board Meeting Agenda

At least ten (10) days before each Board meeting, the CEO sends the directors an agenda for the meeting and a packet of relevant background materials, and the current financial status of fair. Notice shall also be given and made available on the internet at least ten (10) days in advance of the meeting and shall include the name, address and telephone number of any person who can provide further information prior to the meeting. As mandated by open meeting laws,¹ the agenda must include a brief description of all items scheduled for discussion. The description of an item generally need not exceed twenty (20) words. Fair directors are responsible for compliance with open meeting laws.

103 LEGAL OBLIGATIONS

The legal obligation of Board membership is governed by multiple sources. At the most basic level, the governing body of any legally constituted organization is responsible for ensuring that all operations conform to applicable laws and regulations. In general, non-DAA Boards should realize that the law treats nonprofit and for-profit corporations similarly, meaning that every Board member is a trustee responsible for the funds that the organization raises, accepts, and disburses.

103.1 Majority Rule

The authority of an organization is vested through the presence of a majority of its members. Each Board member has an equal voice during topic discussion(s). Fairness and the good faith of Board members and the presiding officer characterize voting at Board meetings. After the vote, the decision of the majority becomes the decision of the Board. It is the duty of every Board member to accept, support, and abide by any decision that has been approved by a majority of directors.

103.2 Quorum

A quorum is the number of members who must be present at a meeting to conduct business and vote. Until a quorum is present, no business may be transacted or voting may take place. The members present may, however, enter into an open discussion of items on the agenda. A quorum always refers to the

¹If your fair is a DAA, the fair should have a copy of a report prepared by the Attorney General's Office: *Bagley-Keene Open Meeting Act* (1989), with amendments; this report covers open meeting requirements applicable to state agencies. If your fair is not a DAA, the fair should have a copy of *The Brown Act* (1994), also prepared by the Attorney General's Office; this report covers open meeting requirements applicable to local agencies. Refer to the Appendix, Section 500 for a copy of these documents. Your CEO can obtain additional copies by calling the Publications Office in the Department of Justice in Sacramento at 916.324.5765 or by Internet at www.caag.state.ca.us

number required to be present to make motions and vote. Further, anytime more than two (2) Board members (applies to District Agricultural Associations only) join together and discuss Board business, it is considered a Board meeting. And, as such, an agenda and notice to the public under the applicable meeting laws must have been given. In absence of proper public notification, Board business may not be discussed.

103.3 Potential for Personal Liability²

Board members should be aware that if they actively participate in or direct the CEO or staff to take actions that are prohibited by federal, state, or local laws, they may be subjecting the fair and themselves to liability. Whether an organization is nonprofit or for-profit, the law provides that when losses occur, Board members cannot legally excuse themselves with a claim of ignorance of the transactions under review, or of the potential implications of actions upon which the Board has voted. If directors consciously or by indifference seek to avoid knowledge of unlawful activity where they have authority to prevent the unlawful activity, they may potentially be held personally liable for the consequences.

103.4 Legal Liability for Public Meetings

If it can be shown that those responsible knew in advance that a meeting took place in violation of the law, a district attorney has the prerogative to pursue enforcement of public meeting laws as either a civil or criminal proceeding.³ Other public officials, as well as private parties, also may initiate litigation of meeting law violations, including to request that board actions taken at illegally held meetings be invalidated. Under some circumstances, prevailing parties are entitled to attorney fees.

103.5 Sexual Harassment

Sexual harassment in employment is a form of illegal sex discrimination that occurs when unwelcome conduct on the basis of an individual's gender affects that person's job. Title VII of the Civil Rights Act of 1964, California Government Code Section 12940 and the California Fair Employment and Housing Act protects both men and women from sexual harassment. Sexual harassment

²**NOTE:** Refer to Chapter 300, Appendix C: for a summary of California's conflict of interest laws prepared by the Attorney General's Office.

³Fair board directors are responsible for knowing and obeying open meeting laws. If your fair is a DAA, the fair should have a copy of a report prepared by the Attorney General's Office: Bagley-Keene *Open Meeting Act* (1989), with amendments; this report covers open meeting requirements applicable to state agencies. If your fair is not a DAA, the fair should have a copy of *The Brown Act* (1994), also prepared by the Attorney General's Office; this report covers open meeting requirements applicable to local agencies. Refer to the Appendix, Section 500 for a copy of these documents. Your CEO can obtain additional copies by calling the Publications Office in the Department of Justice in Sacramento at 916.324.5765 or by Internet at www.caag.state.ca.us

debilitates morale, causes emotional stress and physical damage, interferes with work productivity, and undermines the integrity of the employment relationship. It is a costly form of discrimination that can result in back pay or punitive damage awards, legal costs, and disciplinary actions against employees, including dismissal. Board member may also be charged and held responsible.

The fair must investigate all allegations of sexual harassment properly and adequately. DAAs must also report every allegation of sexual harassment to CDFA even if the complaint is withdrawn or the complainant requests that no action be taken.

Board liability It is the responsibility of the management of the fair to minimize and ultimately eliminate discrimination from the workplace. The Board may be liable if the fair fails to take immediate steps to conduct an official investigation of a sexual harassment complaint. Appendix B of this Chapter, is Department of Food and Agriculture's (CDFA) Sexual Harassment Prevention Policy, and, CDFA's Discrimination Complaint Procedure which may be used to assist directors of DAAs in establishing and implementing a policy for their fair.

Training requirement It is the policy of CDFA that all Fair Board Directors, Chief Executive Officers, and staff with supervisory responsibilities be trained to recognize conduct which has been interpreted by courts or administrative agencies as sexual harassment. (See Appendix B of this Chapter)

103.6 Retaining of Legal Counsel

District Agricultural Associations are required to utilize the services of the California Attorney General's Office in legal matters and to reimburse that office for the services obtained. The state Attorney General does not provide legal representation on behalf of county or citrus fruit fairs. Provision for obtaining legal counsel may be specified in each county fair's agreement with its host county government. All fairs must conform to whichever rules apply, even if free or less expensive legal services are offered. In all cases, care should be taken to reduce or eliminate the possibility of litigation through the exercise of common sense, fair dealing, and good management.

104 LEGISLATIVE PROTOCOL (DAAs)

The Legislative Coordinator in CDFA centrally manages legislative activity affecting DAAs. F&E assists in developing positions on relevant pending legislation by providing the Governor's Office with technical analysis of the potential impacts of proposed legislation and a recommended position. DAAs are not authorized to take independent positions on legislation or to provide testimony at legislative hearings regarding bills on which the Governor's Office has not issued an approved position.

105 OBLIGATIONS TO THE FAIR AND THE COMMUNITY

Board members represent their community's interests through effective management of fairgrounds operations. In accepting appointment, or election, to a Fair's Board, a director implicitly makes a commitment to both the fair and the community to exercise the duties of office as a policy maker, including the following:

- Write a mission statement and review it annually to ensure it still expresses the intent of the Board and is responsive to community needs and realities.
- Gain and maintain familiarity with the fair's policies, budget, services, strengths, and needs.
- Conduct the fair's business as a good steward, with integrity and in keeping with the highest ethical standards.
- Attend Board meetings regularly.
- Review and understand all information contained in the fair's budget and financial statements.
- Serve on Board committees and task forces, both as a dependable member and a leader.
- Put the interests of the fair above special interests.
- Avoid conflicts of interest and incompatible activities including but not limited to the perception of conflicts of interests in all fair related activities and decisions.
- Treat equitably and equally all parties that do business with the fair.
- Actively support the fair through contributions of time and professionalism.
- Stay informed of trends in the fair industry and pending legislation which would affect the fair and/or the industry as a whole.
- Ensure the fair's strict adherence to all applicable laws, regulations, policies, and procedures.
- Establish procedures for entering into sponsorship agreements; assist CEO in identifying local sponsors for the fair.
- Assist the CEO and the fair in addressing local political issues that may impact fair operations.

Appendix A

AREAS OF RESPONSIBILITY

AREA OF RESPONSIBILITY	CEO	FAIR BOARD
Day-to-day operations	Makes all decisions regarding daily operations	No role
Short-term goals (less than one year)	Establishes and carries them out	Monitors performance of CEO in accomplishing short-term goals he or she has set
Long-term goals (more than one year)	Recommends and provides information	Approves long-term goals
Budget	Develops and recommends annual budget	Approves annual budget
Fees and charges	Develops fee schedule	Approves fee schedule
Personnel policies	Recommends and administers	Approves recommended policies
Staffing	Makes all hiring decisions	Authorized to select only the CEO
Staff salaries	Approves salaries, based on state/county guidelines, union contracts, and recommendations from supervisors	Approves line item for salaries in annual budget
Staff assignments	Makes all decisions regarding deployment of staff	No role
Staff grievances	CEO hears all grievances, manages process for addressing them	No role
Staff evaluation	Evaluates overall staff performance, with input from supervisors	Evaluates performance of CEO only
Staff terminations	Makes final decisions with input from supervisors	Authorized to terminate only the CEO

AREA OF RESPONSIBILITY	CEO	FAIR BOARD
Capital purchases	Prepares requests	Approves requests as line item in annual budget
Decisions on building, renovation, leasing, expansion	Recommends, signs contracts with board approval	Makes decisions, assumes financial resources
Emergency repairs	Notifies board chairperson and acts with chair's concurrence	Works with CEO to respond to emergencies
Major repairs	Obtains estimates and prepares recommendation	Approves recommendation
Minor repairs	Authorizes repairs up to amounts pre-approved by board	Establishes policy which specifies amounts CEO may spend without prior board approval
Cleaning and maintenance	Establishes and monitors schedule	No role
Contracts	Negotiates and signs contracts within parameters set by board and state/county to secure services for purposes in keeping with the fair's plan and budget	Establishes policy which specifies amounts CEO may spend without prior board approval
Supply purchases	Purchases supplies according to board and state/county policy and maintains audit trail	Establishes purchasing policies and annual budget for supplies
Risk Management Policy and Program	Develop and implement a written safety plan and strategy which includes regular training	Approves program and policy
Statement of Operations	Prepare and submit to F&E	Review and be informed about the fiscal viability of the fair
Billing, credit, collections	Proposes and implements policy	Approves policy

APPENDIX SECTION

Memorandum

All Employees

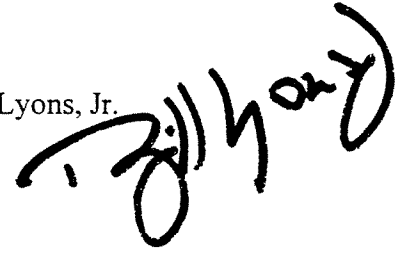
Date: August 2, 1999

Place: Sacramento

Telephone: (916) 654-0433

From: Department of Food and Agriculture - William (Bill) J. Lyons, Jr.
Secretary

Subject: Sexual Harassment Prevention Policy (PL I - 22)



I would like for *all employees* of the California Department of Food and Agriculture (CDFA) to know that I and the management of this Department are committed to *a work environment for all employees that is free from sexual harassment.*

Sexual harassment is a form of discrimination that debilitates morale, causes emotional stress and physical damage, interferes with work productivity, and undermines the integrity of the employment relationship. It is a costly form of discrimination that can result in back pay or punitive damage awards, legal costs, withdrawal of federal support funds to the Department, and disciplinary actions against employees, including dismissal.

The Department's strong sexual harassment prevention policy, together with training, has had a positive effect on reducing the number of sexual harassment cases. Since 1990, when the Department reached a high of 26 cases, there has been a steady decline. By 1997 the number of cases for the Department decreased by 65% to nine cases for the year. However, in 1998 CDFA issued a "**ZERO TOLERANCE POLICY**" that has resulted in even a further decline in cases. In 1998 the Department reached a low of three cases, a drop of 88% for the eight-year period.

In keeping with my commitment to achieve a working environment for all CDFA's employees that is free from sexual harassment, I'm reissuing the attached "**ZERO TOLERANCE**" Sexual Harassment Prevention policy.

We need to continue to focus on prevention by educating all supervisors and managers relative to what constitutes sexual harassment, how to prevent it, what their responsibilities are when it happens, and what the consequences will be if individuals violate the law and CDFA's policy. All CDFA employees are required to attend sexual harassment prevention training as soon after hire as possible. Supervisors and managers are required to attend training as soon as possible after appointment to their supervisory or managerial position. In addition, supervisors and managers are required to discuss sexual harassment prevention and CDFA's policy annually with their subordinate staff.

I'm asking that all supervisors and managers be proactive in ensuring that all employees receive the required training. The Training Office and the Equal Employment Opportunity (EEO) Office are available to assist in achieving our goal.

I want every CDFA employee to feel free to notify management at the onset of any sexually harassing situation, so that expedient corrective measures can be taken. *Please let your supervisor and/or manager know of the situation or contact CDFA's EEO Office immediately.*

Policy Letter: No. I-22

APPENDIX B

To: All Employees

Subject: Sexual Harassment Prevention Policy

Policy

The policy of the California Department of Food and Agriculture (CDFA) is **"ZERO TOLERANCE OF SEXUAL HARASSMENT."** All employees of the Department are entitled to a work environment free from any form of discrimination, including *sexual harassment*. Activities outside of the work place sponsored by CDFA or CDFA Programs are considered part of the work environment and are subject to this policy. Employees are expected to adhere to a standard of conduct that is respectful of all persons within the work environment.

CDFA will not tolerate any form of sexual harassment or retaliation for objecting to such conduct. Employees found responsible for such actions are subject to disciplinary action, including termination, as well as possible civil action.

CDFA has a legal obligation to ensure that the work environment is free from sexual harassment. CDFA is responsible for the actions of managers and supervisors and is responsible for acts of other employees if they know or should have known of such acts and failed to take timely and appropriate action. CDFA is responsible for investigating complaints of sexual harassment in a timely, thorough, and confidential manner and taking appropriate action to end any sexual harassment. This responsibility applies even if the complaint is withdrawn or the complainant requests that no action be taken. Once a sexual harassment complaint has been filed (informally or formally), CDFA is legally obligated to ensure that the work environment is free of discrimination. *Prompt, appropriate action will avoid or minimize the incidents of sexual harassment and potential employer liability.*

What is Sexual Harassment

Sexual harassment in employment is a form of illegal sex discrimination that occurs when unwelcome conduct on the basis of an individual's gender affects that person's job. Title VII of the Civil Rights Act of 1964, California Government Code Section 12940 and the California Fair Employment and Housing Act protects both men and women from sexual harassment. The Equal Employment Opportunity Commission guidelines defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) *Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or*

(3) *Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*

Types of Sexual Harassment

Sexual harassment falls into two categories: *Quid Pro Quo* and *Hostile Work Environment*.

Quid Pro Quo: The traditional demand of sexual favors in exchange for a job benefit or continued employment is quid pro quo sexual harassment — literally, "this for that." It is unwelcome conduct based on an employee's gender that affects a term or condition of employment (29 CFR § 1604.11(a)).

By its very nature, quid pro quo harassment can be committed only by a supervisor or someone with authority over the victim, who can confer or withhold a job benefit. It involves potential economic loss if the harasser's demands are not met and is recognized easily by the courts. Men as well as women can be victimized by this type of sexual harassment.

Hostile Work Environment: A hostile work environment involves unwelcome harassment based on the victim's gender that affects a term, condition, or privilege of employment. The conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and to create an abusive work environment (*Meritor Savings Bank v. Vinson*, 477 US 57, 106 S. Ct. 2399 [1986]).

The harassment does not have to cause mental or physical harm to create a hostile work environment. As long as the environment is reasonably perceived as hostile or abusive, there is no need for it also to be psychologically injurious. If a reasonable person would find the conduct so altered working conditions that it made it more difficult to do the job, sexual harassment has occurred (*Harris v. Forklift Systems, Inc.*, 510 US 17, 114 S. Ct. 367 [1993]).

Hostile work environment sexual harassment can be harassment by a superior of a subordinate employee, harassment by an equal co-worker, or harassment by a client, customer, or vendor.

To be actionable, the gender-based conduct that is allegedly sexual harassment must be unwelcome (29 CFR §1604,11(a)). Joking, sexual innuendoes and dating between co-workers is not sexual harassment under Title VII if it is not unwelcome.

To be unlawful, gender-based harassment has to be pervasive and severe enough to alter the conditions of the victim's employment. Trivial, isolated incidents will not create a hostile

atmosphere. Moreover, the conduct generally must be repetitive; however a one-time occurrence sometimes will be sufficient, especially when physical behavior is involved.

Courts look at the following factors to determine whether the behavior has created a hostile environment:

- ✓ whether the conduct was physical or verbal;
- ✓ how frequently the conduct occurred;
- ✓ whether the conduct was blatantly offensive;
- ✓ whether the harasser was a supervisor;
- ✓ whether more than one person harassed the victim; and
- ✓ whether the harassment was directed at more than one individual.

Asking a co-worker for dates, or occasional teasing, crude jokes or sexual remarks usually will not be considered sufficient to create a sexually hostile environment.

Sexual harassment can also occur between members of the same sex. The conduct is the determinative factor.

Forms of Sexual Harassment

Sexual harassment manifests itself in many forms. The question is whether the conduct can be reasonably perceived as creating a hostile work environment or demanding a quid pro quo. The following are a few examples of sexual harassment. This is not an all-inclusive list:

Verbal: Sexual advances including blatant advances as well as continuing to express sexual interest in someone after being told that the invitation is unwelcome. Derogatory language, gossip, sexual slurs and referring to someone in demeaning and/or sexual terms. Sexual jokes are often very offensive, inappropriate for the workplace and can be demeaning and harmful to people. Lewd remarks, ridicule or nicknames that are sexual in nature or offensive. Discussing sexual fantasies or asking others about their sexual fantasies or preferences. Reprisal, threats of reprisal or implied threats of reprisal following a negative response to an advance. Referring to a person's body parts, whistles, cat calls; remarks about the intimate details of one's sex life or sexual orientation.

Physical: Touching; including a hug, pinch, kiss, patting, stroke on a body part, brushing against or poking another employee, grabbing, picking someone up, pulling someone into your lap, fondling, massaging. Rubbing up against someone. Standing uncomfortably close to another person. Impeding or blocking movement or passage; following someone. Requiring an employee to wear sexually suggestive clothing.

Visual: Sexual gestures, exposing private body parts. Leering (looks which undress with the eyes and result in creating a sense of uncomfortableness in the recipient). Posters/calendars that are sexually suggestive or explicit or potentially offensive to someone else. Written notes or letters that are sexually explicit, containing propositions; literature, poems, posters or drawings; unwanted love letters or notes. Displaying sexual pictures, writings, or objects.

Sexual Favors: Unwanted sexual advances which condition employment benefits upon an exchange of sexual favors. (This may include situations which began as reciprocal attractions but later ceased to be reciprocal; or the individual is treated less favorably than others who have acquiesced to sexual advances.) Repeated requests for dates, any threat of demotion, termination, etc., if requested sexual favors are not given. Making or threatening reprisals after a negative response to sexual advances, propositioning an individual.

Hazing: Initiation that involves a sexual component; women in nontraditional work environments who are dared or asked to perform unsafe work practices, having tools and equipment stolen, etc. Practical jokes, rituals, initiations, often performed to discourage women from entering and/or continuing in jobs/professions traditionally held by men.

Important Terminology

SEXISM is an attitude. It is an attitude of a person of one sex that he or she is superior to a person of the other sex. Example: a man thinks that women are too emotional; or a woman thinks that men are chauvinists.

SEX DISCRIMINATION is a behavior. It occurs when employment decisions are based on an employee's gender, or when an employee is treated differently because of his or her gender. Example: a female supervisor always asks the male employees, in a coed workplace, to move the boxes of computer paper; or a male supervisor always asks the female employees, in a coed workplace, to make coffee.

SEXUAL HARASSMENT is a behavior. It is defined as unwelcome behavior of a sexual nature. Example: a man whistles at a woman as she walks by; or a woman looks a man up and down as he walks toward her; or a heterosexual individual makes sexually offensive remarks to a homosexual individual, or vice versa.

Liabilities for Sexual Harassment

Sexual harassment is a costly proposition that can have far-reaching impact on the Department, such as unplanned budgetary expenditures for attorney costs/settlements, withdrawal of Federal support funds (USDA funding), and usurping of staff resources.

Individual Harasser: An individual employee found guilty of sexual harassment may be **personally financially liable** and may be sued accordingly. Insurance generally does not indemnify for intentional conduct, and the employer has no legal obligation to pay either the costs of defense or judgment for an employee determined to have sexually harassed another. The employee may be responsible for paying part or all if monetary damages are awarded. Monetary damages may include substantial compensatory and punitive damages and attorney costs. CDFA's "Zero Tolerance" policy will subject the employee to disciplinary action, up to and including termination.

Managers and Supervisors: Managers and supervisors are responsible for ensuring a work environment free of sexual harassment. Managers/supervisors must take immediate action if they learn that one of their subordinates may be sexually harassing a co-worker. Failure to take appropriate action can expose the manager/supervisor to **personal financial liability** for damages, as well as disciplinary action. Supervisors/managers who make sexual advances and base a promotion or the retention of a job on the acceptance of these advances can be held **personally financially liable** for their conduct/behavior, as well as subject to disciplinary action.

CDFA: Employers (CDFA) can be held **financially liable** for their acts and the acts of their employees (managers, supervisors, administrators, and co-workers) *if the employer knows or should have known of the existence of sexual harassment and fails to take appropriate action.*

Supervisor/Manager Responsibilities

Supervisors/managers are responsible for setting the tone for a harassment-free work environment and taking appropriate measures whenever they witness or hear about conduct that could be construed as sexual harassment. Staff need to be reminded periodically that: **(1) sexual harassment in any form will not be tolerated and that complaints will be dealt with immediately;** and **(2) retaliation against any person who complains about sexual harassment is unlawful, and that disciplinary action will be taken.**

Supervisors/managers must respond immediately, objectively and completely to employee complaints about sexual harassment. Once a sexual harassment complaint is brought to the attention of a supervisor/manager, they are legally obligated to ensure that the work environment is free from sexual harassment. **Supervisors/managers must inform the EEO Office regarding the complaint and obtain guidance/assistance with the investigation.**

Employee Rights and Responsibilities

All employees of CDFA are entitled to a work environment free from sexual harassment. Employees assigned to work sites that are owned and operated by the agricultural industry are also entitled to a work environment free from sexual harassment. Employees who feel they are being sexually harassed should immediately convey their concerns to their supervisor/manager or to the EEO Office.

Any employee who perceives the comments, gestures, or actions of another employee or supervisor/manager to be offensive or sexually harassing should immediately and clearly communicate to that person that such behavior is unwelcome, and inappropriate. Failure to express unwelcomeness does not prevent the employee from filing a complaint nor does it in anyway exonerate the harasser. Very often, victims of sexual harassment are afraid to confront the harasser. For this reason, it is extremely important that the witnesses to possible sexual harassment of others also take responsibility for contacting the EEO Office or an appropriate supervisor/manager.

Any employee who feels they have been sexually harassed, retaliated against for complaining about sexual harassment or retaliated against for participating in a sexual harassment inquiry, may pursue any of the following avenues of redress:

1. Ask their supervisor/manager to informally resolve the concern.
2. Resolve the concern themselves at the informal level by using the informal complaint process contained in CDFA's Procedural Circular No. II-53, Discrimination Complaint Process.
3. File a formal discrimination complaint with the CDFA EEO Office using the process contained in CDFA's Procedural Circular No. II-53, Discrimination Complaint Process.
4. File a formal discrimination complaint with any of the other agencies referred to in CDFA's Procedural Circular No. II-53, Discrimination Complaint Process.

CDFA does not tolerate sexual harassment in any form. Any employee who feels they have been sexually harassed or retaliated against is encouraged to bring the issue to the attention of their supervisor, manager, or the EEO Office immediately.

Reasonable Victim Standard

Previously, courts used a "reasonable person" standard by which to judge whether an action is harmful or offensive. The reasonable person could be male or female. However, some courts, including the Ninth U.S. Circuit Court of Appeals (California), are recognizing that in sexual harassment cases, the reasonable person standard does not consider the perspective of the usual victim being female.

Courts have held that since women are most often the recipients of sexual harassment, that the standard on which one decides if an action is sexual harassment should be that of the reasonable woman. Also, in cases where the subject of the harassment is a male, the standard should be that of a reasonable man. The courts are acknowledging that men and women have different perspectives about the same type of conduct. For instance, the conduct that men find unobjectionable could be offensive and unacceptable to women. Men often view more subtle forms of sexual harassment that are offensive to women as only teasing and joking.

The Ninth U.S. Circuit Court of Appeals in the *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) addressed the reasonable woman standard:

"We believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assaults, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."

Men and women often differ in the way they communicate and in their understanding of communications. The reasonable woman standard means that comments or compliments that men consider well intentioned can be sexual harassment. The sexual harasser does not have to intend or even realize that his/her conduct is sexual harassment to create a hostile work environment.

Sexual Harassment Prevention Training

All CDFA employees are required to attend a sexual harassment prevention-training program. Supervisors/managers are responsible for ensuring that all subordinate employees complete the course as soon after hire as possible. All employees new to CDFA shall be provided with a copy of CDFA's Policy Letter No. I-22, Sexual Harassment Prevention Policy and Procedural Circular No. II-53, Discrimination Process Procedures, as part of the hiring package.

All newly appointed supervisors/managers are required to attend a sexual harassment prevention training program as soon as possible after appointment.

All supervisors/managers are required to discuss sexual harassment prevention and CDFA's Sexual Harassment Policy with subordinate employees annually.

For More Information

Any employee, supervisor, or manager seeking advice, guidance or consultation regarding a particular situation, or any issue regarding sexual harassment, may contact CDFA's EEO Office at (916) 654-1005 or CALNET 464-1005, or stop by the headquarters office located at 1220 N Street, Room A-446, Sacramento, CA.

William (Bill) J. Lyons, Jr.
Secretary

Est. : 02/08/82

Rev.: 10/10/97

PROCEDURAL CIRCULAR: No. II-53

APPENDIX B

TO: All Employees

SUBJECT: Discrimination Complaint Procedure

I. Purpose

The purpose of the Department's discrimination complaint procedure is to provide all California Department of Food and Agriculture (CDFA) and District Agricultural Association (DAA) employees with a uniform and effective system to resolve complaints arising from discrimination and sexual harassment. Government Code Sections 19700-19706 prohibit discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, marital status, sex, and political affiliation. The Federal Age Discrimination in Employment Act of 1967 prohibits age discrimination for individuals over forty years of age, and the Governor's Executive Order D-54-79 prohibits discrimination on the basis of sexual orientation. *All prohibit retaliation and harassment.*

The Department of Food and Agriculture's policy on discrimination is contained in PL II-16, Discrimination Policy, and the sexual harassment policy is contained in PL II-22, Sexual Harassment. Copies of the policies are available from your supervisor or the Equal Employment Opportunity Office (EEO).

II. Procedures

The Department's internal discrimination complaint process allows the employee or applicant to seek resolution of his/her complaint either informally or formally. The internal process provides for prompt, fair, and impartial review of the discrimination complaint. Employees are urged to seek resolution of complaints on an informal basis. However, they are not prohibited from bypassing the informal complaint and filing a formal complaint through the formal process.

A. Informal Complaint Process

Employees who believe they have been discriminated against should immediately seek resolution through the informal complaint process. Efforts will be made to resolve the complaint within 15 working days of the filing of the informal complaint. There are a number of options available to the complainant in seeking informal resolution of the complaint.

Options Available:

- The complainant may contact the individual responsible for the discriminatory act(s); to inform him/her of the discriminatory act(s) and request the actions to be stopped.
- Complainant may request assistance from his/her immediate supervisor in resolving the complaint.
- Complainant may contact the supervisor of the unit of the employee alleged to be initiating the discriminatory act(s) and request assistance.
- The complainant may contact CDFA, EEO Office for referral to an EEO Counselor. CDFA, EEO Counselors are available to assist employees with the informal discrimination process.
- The complainant may contact the EEO Office for advice for assistance in resolving the complaint.

These options are available individually or in combination with each other.

Supervisors and managers will contact the EEO Office for guidance and assistance in resolving complaints at the informal level.

Confidentiality will be maintained at the informal level unless permission is given to do otherwise, or the complaint is regarding sexual harassment. In cases of sexual harassment, complete confidentiality cannot be assured because of CDFA's legal obligation to take immediate corrective action. CDFA is responsible for investigating all sexual harassment complaints and to take appropriate action to end sexual harassment. The responsibility applies even if the complaint is withdrawn or the complainant requests that no action be taken.

Regarding complaints not related to sexual harassment, if the complainant is unable to resolve the complaint informally and chooses to pursue the complaint *by filing a formal complaint, the complainant should be aware that confidentiality cannot be guaranteed.*

B. Formal Complaint Process

If the employee is not satisfied with or wishes to bypass the informal complaint process, a formal complaint of discrimination may be filed with the CDFA, EEO Office. The complaint *must be in writing and filed within one year of the date of the discriminatory action*. An additional 90 days is granted following the expiration date if the complainant just obtained knowledge of the facts of the unlawful discrimination.

The EEO Office determines if the complaint filed meets jurisdictional and procedural requirements and assigns an investigator. The objective of the investigation is to determine if there is sufficient evidence to show a violation of equal employment opportunity laws.

If the complainant is not satisfied with the decision of the Department on the discrimination complaint, he/she may appeal the decision to the State Personnel Board (SPB). The appeal must be in writing and filed within 30 days from the date of the Department's decision.

Formal complaints may be withdrawn *only by the person(s) claiming to be aggrieved* and must be in writing, signed by the complainant and directed to the attention of the CDFA, EEO Officer. As stated in Part "A", all complaints of sexual harassment will be investigated by the Department, even if the complaint is withdrawn or the complainant requests that no action be taken.

1. Filing Formal Complaint

A complaint alleging discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, political affiliation, sexual harassment, or reprisal for filing a formal complaint may be filed with the:

Department of Food and Agriculture
Equal Employment Opportunity Office
1220 N Street, Suite A-446
Sacramento, California 95814

Telephone: (916) 654-1005
CALNET: 8-464-1005

The complaint must be in writing and signed by the complainant. The complaint may be submitted to the EEO Office in person or by mail.

2. Contents of a Formal Complaint

The formal complaint must contain the following specific information:

- a. The complainant's full name, classification, work unit, address, and telephone number.
- b. The full name, classification, work unit, address and telephone number of the person against whom the charge is made.
- c. Complaints of discrimination must indicate the basis of discrimination, such as age, ancestry, color, physical or mental disability, marital status, medical condition, national origin, pregnancy, political affiliation or opinion, race, religion, retaliation, sex, sexual harassment, sexual orientation, or Vietnam era veteran. The complainant must provide sufficient information to show a connection between the basis and how they believe they have been adversely affected. A *prima facie* case of discrimination must be established before an investigation is initiated.
- d. The attached *CDFA Discrimination Complaint Guide* should be used as a guide when filing a formal discrimination complaint. The form, when completed, will contain all the information necessary for the EEO Office to determine jurisdiction and a *prima facie* case. Also, the form, when completed and signed by the complainant, is acceptable as the written complaint.

3. Processing a Formal Complaint

Upon receipt of the complaint, the EEO Office will acknowledge to the complainant, in writing, that the complaint has been received. In addition, the EEO Office will contact the complainant and verbally discuss:

- a. The complaint procedures;

- b. Assisting the complainant, if needed, to clarify specifics of the complaint;
- c. Advising the complainant whether the complaint is within jurisdiction warranting an EEO investigation; and
- d. Advising the complainant of his/her appeal rights to federal, state, and local agencies.

In addition, the EEO Office will contact the Division Director and/or the Branch Chief and the person responsible for the alleged discriminatory behavior and advise them:

- a. That a complaint has been received and of the intent of the EEO Office to investigate the allegations; and
- b. Of the Department's policy against retaliation.

If the complainant so desires, the EEO Office will attempt to mediate the complaint and reach a voluntary agreement/resolution between the complainant and the charged party.

The charged party will be informed of the charge(s) and allowed to respond once an investigation is initiated. When the investigation is completed, the charged party will be informed of the findings and decision. Information gathered during an investigation will be kept in confidence to the extent possible.

4. Retaliation/Reprisal

Government Code Section 19572, California Fair Employment and Housing Commission Code Section 7287.8(a), and Section 740(a) of the Civil Rights Act, Title VII, makes it *an unlawful employment practice to discriminate against an employee as a result of his/her filing a complaint, testifying, assisting, or participating in any manner in an investigative proceeding or hearing*. Employees should immediately report to the EEO Office any actions they perceive as retaliation as a result of participating in the Department's discrimination complaint process.

III. Employment Discrimination Appeal Rights Outside CDFA

Complainants may file a complaint with *any or all* of the following agencies at the same time they file with CDFA in order to protect their rights under the appropriate state or federal statutes. The addresses listed are headquarters or district offices. Complainants may refer to their local telephone directory or call the listed agencies for local offices in their area.

A. State Personnel Board (SPB)

Any complainant who disagrees with the Department's investigative findings may file an appeal and request a hearing with SPB. A request for a hearing must be filed with SPB within 30 calendar days of the Department's decision. If the complainant is dissatisfied with the decision of SPB or the request for hearing is denied, an appeal may be filed with the superior court. Discrimination complaints are generally filed with the Department (CDFA) prior to filing with SPB.

A complaint may be filed directly with SPB for issues involving retaliation for previously utilizing the discrimination complaint process and for complaints against the Department's Secretary or executive staff. Any complaints based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, sexual harassment, or reprisal for filing a formal complaint may be appealed to:

State Personnel Board
Appeals Division
801 Capitol Mall
P.O. Box 944201
Sacramento, CA 94244-2010
Telephone: (916) 653-0799
CALNET: 8-453-0799

Government Code Section 18671.1 requires that SPB's consideration and decision on appeals shall not generally exceed a six-month period or 90 days from the time of submission, whichever time period is less, except that SPB may exceed the six-month period up to 45 additional days. Failure by SPB to render a timely decision constitutes exhaustion of the available administrative remedies. In cases involving complaints of discrimination, harassment, or retaliation, where the executive officer renders a decision, the decision shall be rendered within four months of the filing of the appeal.

B. Department of Fair Employment and Housing (DFEH)

Any complaint of sexual harassment or of discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age or reprisal for filing a formal complaint, may be appealed to:

Department of Fair Employment and Housing
2000 O Street, Suite 120
Sacramento, CA 95814

Telephone: 1-800-884-1684
TDD: (916) 324-1678 - Sacramento
TDD: (213) 897-2840 - Los Angeles

Complaints must be filed with DFEH within one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred. This period may be extended, not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts after the expiration of one year from the date of its occurrence. (Government Code Section 1421)

C. U.S. Equal Employment Opportunity Commission (EEOC)

Any complaint of sexual harassment or of discrimination based on race, color, physical or mental disability, medical condition, marital status, religious creed, sex, national origin, ancestry, age, or reprisal for filing a formal complaint may be appealed to:

U. S. Equal Employment Opportunity Commission
San Francisco District Office
901 Market Street, Suite 500
San Francisco, CA 94103

Telephone: (415) 744-6500
TDD: (415) 744-7392

The complaint must be filed within 180 days of the alleged unlawful practice. The 180-day period for filing a complaint does not begin until the claimant becomes aware of the discriminatory act. If there is a state or local fair employment practice law administered by an agency that deals with discriminatory practices, the EEOC may defer to such law under Section 706(c) of Title VII of the Civil Rights Act. If the agency has no subject matter jurisdiction over the charge, the complaint will be filed with EEOC, but the complainant has only 180 days from the date of the violation to file. If it is clear that the Section 706(c) agency has waived its right to process the charge, the complaint will be filed with EEOC upon

receipt by the commission. In this situation, the complainant has 300 days to file with EEOC.

D. Office of Federal Contract Compliance Programs (OFCCP)

Any complaint of sexual harassment or of discrimination based on race, color, religion, sex, national origin, ancestry, physical or mental disability, or disabled Vietnam veteran status may be appealed to:

Office of Federal Contract Compliance
Program (OFCCP) (Regional Office)
71 Stevenson Street, Suite 1700
San Francisco, CA 94105
Telephone: (415) 744-6640

Complaints must be filed within 180 days of the alleged violations unless the time for filing is extended by the Director of OFCCP for good cause shown. (41 CFR 60-1.21)

Any questions regarding the discrimination process should be directed to the CDFA, EEO Office at (916) 654-1005 or CALNET 8-464-1005.

Darrell Guensler
Deputy Secretary

DISCRIMINATION COMPLAINT GUIDE

(1/97)

☐ INFORMAL COMPLAINT☐ FORMAL COMPLAINT

INSTRUCTIONS: This form should be used as a guide when filing a discrimination complaint. **Use of this form is not mandatory.** Informal complaints should be discussed with an Equal Employment Opportunity (EEO) Counselor or the EEO Officer. Formal complaints should be filed with the EEO Office, 1220 N Street, Suite A-446, Sacramento, CA 05914.

COMPLAINANT INFORMATION:

NAME	HOME ADDRESS	HOME TELEPHONE NUMBER
CIVIL SERVICE CLASSIFICATION	PLACE OF EMPLOYMENT	WORK TELEPHONE NUMBER

BASIS OF COMPLAINT

Select only one category which best describes alleged discrimination. If more than one category applies, use a SEPARATE form for each type of discrimination.

- ☐ AGE (anyone at or over 40)
- ☐ ANCESTRY (national or cultural origin)
- ☐ COLOR (skin color)
- ☐ DISABILITY
 - ☐ Physical
 - ☐ Mental
 - ☐ Medical Condition
- ☐ MARITAL STATUS (divorced, married, never married, separated, widowed, etc.)
- ☐ NATIONAL ORIGIN (birth site, language or accent)
- ☐ POLITICAL AFFILIATION (membership or association in a political party or special interest group)
- ☐ PREGNANCY (childbirth or related medical condition)
- ☐ RACE (one of the anthropological racial/ethnic groups: American Indian, Asian, Black, Filipino, Hispanic, Pacific Islander or White)
- ☐ RELIGION (spiritual beliefs)
- ☐ SEX (gender — male or female)
- ☐ SEXUAL HARASSMENT (unwelcome attention of a sexual nature)
- ☐ SEXUAL ORIENTATION (bisexual, heterosexual, or homosexual)
- ☐ VIETNAM ERA VETERAN (served on active duty between 8/5/64 and 5/7/75; discharged with honorable or service connected disability)
- ☐ RETALIATION (prohibited discrimination against complainants, their representatives, EEO officials, witnesses, or other agency employees/applicants for having opposed any illegal discriminatory employment practice, for having presented, or for having participated in the presentation by another person of any complaint of discrimination at any stage of the complaint process, including the counseling stage or any time thereafter.)

DISCRIMINATION COMPLAINT GUIDE
(1/97)

I. WHO IS/ARE THE PERSON(S) RESPONSIBLE FOR THE ALLEGED ACTION AGAINST YOU?
PLEASE INCLUDE COMPLETE NAME AND CORRECT CLASSIFICATION:

Name	Classification	Work Location	Phone Number

II. LIST THE OPPORTUNITIES WHICH YOU WERE DENIED (this may not pertain to sexual harassment allegations):

III. HOW DO YOU KNOW YOU WERE DENIED THE OPPORTUNITY? (How did you find out, how were you informed?) PLEASE INCLUDES DATES (this questions may not pertain to sexual harassment allegations):

IV. DESCRIBE THE REASON YOU BELIEVE YOU SHOULD HAVE RECEIVED THE OPPORTUNITY(IES): (i.e., qualifications, seniority, written or verbal commitment, etc. This question may not pertain to sexual harassment allegations.)

V. CHECK THE ITEM(S) BELOW WHICH WERE AFFECTED BY THE ALLEGED ACTION. **PLEASE INCLUDE DATE OF OCCURRENCE:**

<input type="checkbox"/> DISCIPLINARY ACTIONS	DATE OCCURRED	_____
<input type="checkbox"/> FRINGE BENEFITS	DATE OCCURRED	_____
<input type="checkbox"/> HARASSED	DATE OCCURRED	_____
<input type="checkbox"/> HIRING	DATE OCCURRED	_____
<input type="checkbox"/> PAY	DATE OCCURRED	_____
<input type="checkbox"/> PERFORMANCE EVALUATION	DATE OCCURRED	_____
<input type="checkbox"/> PROMOTION (DENIED)	DATE OCCURRED	_____
<input type="checkbox"/> WORK ASSIGNMENTS	DATE OCCURRED	_____
<input type="checkbox"/> WORKING CONDITIONS	DATE OCCURRED	_____
<input type="checkbox"/> OTHER (describe)	DATE OCCURRED	_____

VI. BRIEFLY EXPLAIN THE CONDITION(S) CHECKED IN ITEM V. ABOVE. INCLUDE IF YOU BELIEVE OTHERS WERE TREATED DIFFERENTLY. **PLEASE INCLUDE DATES.**

VII. WHAT REASON OR EVIDENCE DO YOU HAVE TO SUPPORT YOUR BELIEF THAT DISCRIMINATION (including sexual harassment) OCCURRED? **PLEASE INCLUDE DATES.**

VIII. WHAT PEOPLE HAVE INFORMATION/KNOWLEDGE ABOUT YOUR SITUATION/ WHAT INFORMATION DO YOU BELIEVE EACH PERSON HAS TO OFFER?

NAME:

INFORMATION:

NAME:

INFORMATION:

IX. WHAT CORRECTIVE ACTION ARE YOU SEEKING?

EMPLOYEE RIGHTS

All employees are assured of the following rights with regard to complaints of discrimination:

1. The right to file a discrimination complaint, freedom from influence to refrain from filing a complaint and freedom from reprisal for filing a complaint.
2. The right to a reasonable amount of work time to make an informal presentation of a complaint to an EEO Counselor. Consistent with immediate needs, this right shall not be abridged or its exercise delayed by any supervisor.
3. The right to be assisted by a representative of their own choosing at all stages of the process.
4. The right to keep their complaint confidential until:
 - a. Such time as they give the EEO Counselor permission to do otherwise in order to bring the complaint to the appropriate authority for remedy; or
 - b. Such time as a formal written complaint is filed with CDFA's EEO Office; or
 - c. Such time as appropriate action must be taken to resolve the situation; or
 - d. In cases of sexual harassment, complete confidentiality cannot be assured because of CDFA's legal obligation to take immediate corrective action.
5. The right to a full, impartial and prompt investigation by a trained departmental EEO Complaint Investigator.
6. The right to appeal the Department's decision to the State Personnel Board.
7. The right to file concurrent complaints with the Equal Employment Opportunity Commission, the Department of Fair Employment and Housing, other appropriate State and Federal compliance agencies; or to file a civil action in the appropriate courts.

I HEREBY WAIVE THE RIGHT TO CONFIDENTIALITY (Please initial): Yes ____ No ____
(*Waiver of Confidentiality applies to informal complaints only*)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Complainant's Signature

Date Signed

Please complete the following for statistical purposes only (optional):

Last four digits of Social Security number

Ethnicity

Gender: ☐ Male ☐ Female

Age: ☐ Over 40 ☐ Under 40

STATE OF CALIFORNIA

DEPARTMENT OF FOOD AND AGRICULTURE

Jurisdiction is the common term for determining whether a department has the legal power to act on a complaint. Under the law, a department must have jurisdiction over a complaint in order to investigate it or attempt resolution. The issue of jurisdiction must be addressed initially in every case at the preliminary stage of the discrimination complaint. The jurisdictional requirements needed for the Department to have legal authority are discussed below. The person filing the complaint is responsible for ensuring all jurisdictional requirements are met.

INDIVIDUALS COVERED

The State Personnel Board's administered discrimination complaint process covers employees in all State departments, agencies, and officers in civil service and all applicants for the positions in the State civil service. Persons in exempt positions are not covered by this process.

FORMAT AND CONTENT

An informal discrimination complaint may be taken either in writing or verbally by the employee's supervisor, an Equal Employment Opportunity (EEO) Counselor or by the EEO Officer.

A formal discrimination complaint must be in writing and signed by the complainant. At a minimum, a complaint must contain a precisely written statement sufficiently identifying the parties and generally describing the alleged discriminatory actions or practices and the dates on which they occurred.

This form may be used for filing either an informal or formal complaint. A complaint cannot be dismissed because the complainant refuses to complete the departmental form.

TIMELINESS

A complaint must be filed with the Department within one year of the date of an alleged discriminatory action or practice. The one-year filing period may be extended, not in excess of an additional 90 days, if the complainant first obtained knowledge of the facts of the alleged discriminatory action or practice after the expiration of the one year date. To receive the 90-day extension, the complainant must show that either he/she attended a class or received some new information that brought the discriminatory matter to his/her attention.

An informal complaint filed with an EEO Counselor within the one-year time limitation does not constitute a formal filing. The time utilized in the informal process is counted when calculating the timeliness of a formal complaint.

BASIS

Complaints of discrimination must allege that the complainant was discriminated against on one or more of the following bases: age, ancestry, color, disability, marital status, medical condition, national origin, pregnancy, political affiliation or opinion, race, religion, retaliation, sex, sexual harassment, sexual orientation or Vietnam veteran.

STANDING

A complainant must allege or show that he/she has been directly injured by the discriminatory action or practice. A complaint cannot be filed on the basis that the complainant believes that future harm may occur. The complainant must show that he/she has been adversely affected with respect to compensation, condition,

DISCRIMINATION COMPLAINT GUIDE

(1/97)

Page 6

privilege, or term of employment. A complainant cannot challenge a discriminatory employment practice that has not caused him/her any direct harm, unless he/she is filing on behalf of one who has been directly harmed. A charge filed on behalf of a person claiming to be discriminated against may be filed by any person, agency, or organization.

REMEDY

The complainant must provide some indication of the type and extent of the remedy sought as a result of the alleged discrimination. A complaint of discrimination which cannot be resolved by the appointing power, or which is not within the authority of the appointing power to resolve, shall be filed with the State Personnel Board as an appeal, or with an appropriate agency.

ESTABLISHING A PRIMA FACIE CASE

To meet further requirements of jurisdiction, enough evidence must be presented to raise the inference that the allegations are true. An inference of discrimination cannot be made by the complainant solely stating that he/she is a member of a protected group. The complainant establishes the case by demonstrating a causal connection between the basis for the complaint and how he/she believes he/she was adversely affected. A prima facie case of discrimination is determined by one of the theories of discrimination discussed below:

Disparate Treatment Theory - Any act, policy, or decision which makes, or has the effect of creating a non-job related distinction or different treatment of an individual or a group of people. The complainant must show that in comparison to similarly situation individuals, he/she is treated differently. Due to this difference in treatment, it would be reasonable to infer, absent other evidence, that discrimination has occurred. The presence of discriminatory motive or intent could be inferred from the fact that there were unjustified differences in treatment.

Accommodation - This theory encompasses the claim that the employer failed to provide accommodation to a request based on religious observances or practices; or failed to reasonably accommodate an otherwise qualified disabled individual. The complainant must show that he/she informed the employer of the need for accommodation and there was a failure to accommodate. The claim is not that an employer treated a person differently, but the employer failed to do something for the complainant.

Religion - The complainant must establish that the belief upon which an observance or practice is based is religious in nature and that the religion belief is sincerely held.

Disability - The complainant must establish that he/she meets the definition of an otherwise qualified disabled individual and that he/she can perform the essential functions of the job with or without accommodation without reasonable probability of injury to himself/herself or to others.

Retaliation - Retaliation or reprisal is an act by an employer or charged party, such as demoting, suspending, reducing, failing to hire or consider for hire, failing to give equal consideration in making employment decisions, failing to treat impartially in the context of any recommendations for subsequent employment which the employer may make, adversely affecting working conditions, or otherwise denying any employment benefits to an individual because that individual has opposed discriminatory practices or

DISCRIMINATION COMPLAINT GUIDE

(1/97)

Page 7

has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing involving discrimination.

The theory of retaliation requires that a retaliatory motive play a part in the adverse treatment. It requires a showing that the employer or charged party had actual or imputed knowledge of the person(s) engaging in the protected activity.

DEFINITION OF DISABILITY

Physical disability includes, but is not limited to all of the following:

- a. Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
 1. Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.
 2. Limits an individual's ability to participate in major life activities. Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement.
- b. Any other health impairment not described in paragraph a. above, that requires special education or related services.
- c. Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph a. or b. above.
- d. Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described paragraph a. or b. above.

Mental disability includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

Medical condition includes any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.